No. 80-5854

IN THE

SUPREME COURT OF THE UNITED STATES

GARNETT WILLIAM CAPE,

Petitioner,

-V.-

THE STATE OF GEORGIA,

Respondents.

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On Writ of Certiorari

To the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1.) Did the Supreme Court of Georgia err in holding that the trial court in Petitioner's case was not required to deliver a limiting charge to the jury as to the meaning and application of Georgia Code Annotated Section 27-2534.1(b)(7) so as to render Petitioner's resultant death sentence violative of this Court's ruling in Godfrey v. Georgia and the Eighth and Fourteenth Amendments to the Constitution of the United States?

2.) Did the failure of the trial court to adequately charge the jury as to mitigating circumstances in this capital case deny Petitioner Due Process of Law?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner prays that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, entered October 8, 1980, denying Petitioner's appeal to have vacated the sentence of death imposed upon him at trial.

OPINION BELOW

The Opinion of the Supreme Court of Georgia in Petitioner's case, Cape v. State, is filed as No. 36298 of that Court and is set out in the Appendix as Appendix A.

JURISDICTION

The final judgment of the Supreme Court of Georgia was entered on October 8, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3) to review the denial of certain enumerated rights guaranteed Petitioner under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States and the privileges and immunities clause therein.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. Section 26-1101-

> "Murder(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. Section 26-3102-

> "Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death provided that no such finding of statutory aggravating circumstance shall be necessary in offense of treason or aircraft hijacking. The provisions of this section shall not effect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. Section 27-2534.1-

"Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offense of aircraft hijacking or treason, in any case,

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

1.) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

2.) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

3.) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

4.) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

5.) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

6.) The offender caused or directed another to commit or committed murder as an agent or employee of another person.

7.) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

8.) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duites.

9.) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

10.) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instruciotns as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the (statutory) aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. Section 27-2537-

"Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trail court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

1.) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

2.) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1(b), and

3.) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1.) Affirm the sentence of death; or

2.) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of

Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74.-

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guily or pleas of nolo contendre of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known for the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropraite instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishmant. If the trail court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

STATEMENT OF THE CASE

On the evening of May 17, 1979, the body of Karen Dove, age fifteen, was discovered in the home of Petitioner, Garnett William Cape, in Lavonia, Georgia (T-266). Petitioner was arrested that evening and was subsequently indicted by the Grand Jury of Franklin County, Georgia, for the murder of Ms. Dove (R-4-5). Petitioner was tried by a jury in the Superior Court of Franklin County, Judge William Grant presiding.

At trial, Dr. James Dawson, Assistant Director of the Georgia Crime Laboratory, testified for the State as to the findings of his autopsy on the body of Karen Dove (T-284). Dr. Dawson testified that the victim had sustained six wounds to her head (T-305) involving fairly extensive fracturing and lacerations (T-298-299). There were areas of bruising on the face (T-298) which Dr. Dawson conceded was probably attributable to the seepage of blood from the head injuries (T-333-334). Dr. Dawson further testified that the victim had sustained seven stab wounds, two in the chest (T-300) and five in her back (T-299 -300). It was Dr. Dawson's conclusion that the stab wounds were inflicted after the head wounds (T-314) and that the head wounds were inflicted prior to the cessation of the victim's heartbeat (T-313). Dr. Dawson concluded that the victim had most probably died from the loss of blood (T-311).

On cross-examination, Dr. Dawson testified that any of the various head wounds the victim sustained could have caused her to lose consciousness (T-332, 334-335). Although Dr. Dawson testified as to his belief that the victim's heart was still beating at the time she was stabbed (T-337), he noted that there was apparently very little external bleeding from the stab wounds (T-340) and he could not unequivocally say that the victim was clinically "alive" when she sustained the stab wounds (T-344).

Marcia Silverman, a forensic serologist, examined certain specimens taken from the victim by Dr. Dawson. A vaginal swab failed to reveal the presence of seminal fluid (T-346). An oral swab weakly suggested the presence of seminal fluid but failed to reveal the presence of spermatozoa. The serologist explained that she had performed three tests for the presence of seminal fluid; one was positive and two were negative. The positive test was for acid phosphatase which is also found in other body fluids (T-347). Ms. Silverman could not say that she had positively determined that the fluids were semen (T-380).

In his defense, Petitioner called nine witnesses who uniformly testified as to his good character and his reputation for nonviolence in the community (T-586-603).

Petitioner himself took the stand to testify in his defense (T-604). He stated that he was fifty-six years old and that he had been born in Franklin County and was one of nine children. Petitioner went through the sixth grade before dropping out to help make a living for his family on the tenant farm where they lived (T-605). He was drafted into the Army at age nineteen in 1943 (T-606) and served most of his time in an armored division at Fort Knox (T-607). He received an Honorable Discharge upon his release from the service (T-609). While in the Army, Petitioner had married and a son was born to the couple after Petitioner was discharged (T-610). Petitioner did mostly plumbing and construction work to support his family (T-611-613). During these years he supported many of his family members who needed him (T-616). He divorced in 1973 and moved into his parents' home after his mother became an invalid (T-620). Petitioner's son is now thirty-three years old and he has one son (T-622). Petitioner testified that he had never been in any trouble with the law before that time, save for a warning ticket he received while driving through Mississippi (T-618). Petitioner further testified that he had known the victim's father for abour four or five years (T-622) and that they were friends. Linda Dove, the victim's step-mother, is the daughter of Petitioner's brother (T-623) and Petitioner and the victim were acquainted.

Petitioner went on to testify to an exculpatory version of the facts.

A jury of twelve found Petitioner guilty of the murder of Karen Dove on November 8, 1979 (T-776).

During the punishment phase of the trial, Petitioner called several witnesses in mitigation. Petitioner's sixty-seven year old sister testified that when her husband had run her and her children out of their home Petitioner had taken them in and supported them for approximately six months (T-782). She further testified that she had never know Petitioner to do a violent act (T-783). Testimony by another one of Petitioner's sisters, a brother and Petitioner's son was in substantially the same vein, uniformly portraying Petitioner as a law-abiding and generous individual (T-783-786).

Petitioner took the stand during the penalty phase to plead for mercy (T-787) and spoke of his grief for Karen Dove's family.

As the State had alleged that the murder was aggravated by the conditions set forth in Georgia Code Annotated Section 27-2534.1(b)(7), the judge alluded to that Section as follows:

> "BY THE COURT: Now, in this case, ladies and gentleman, the one that we are trying, the State contends that the offense of murder for which the accused, Garnett William Cape, has been convicted was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim, Karen Dove (T-812)."

The court went on to explain that the jury was required to find that the aggravating circumstance was proven beyond a reasonable doubt (T-812) and that they were to set forth the aggravating circumstance in writing if they made such a finding (T-812, 814-815). The jury was provided with a sheet of paper upon which the language of Section (b)(7) was typed (T-815) to take with them when they retired to deliberate. There was no further instruction as to the substance of Section (b)(7) and its applicability from the court in its charge.

As to mitigating circumstances, the court charged the jury to:

> "BY THE COURT:....consider, ladies and gentlemen, any mitigating circumstances. Mitigating circumstances are those circumstances which in fairness and mercy shall be considered by you in fixing the punishment. You may if you see fit--and this is a matter entirely within your discretion--provide for a life sentence for the accused based upon any mitigating circumstance or reason satisfactory to you, or without any reason, if you see fit to do so.(T-813-814).

The jury recommeded that Petitioner be sentenced to death (T-816) and the court accordingly sentenced Petitioner to death in the electric chair (T-817).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1.) The failure of the trial court to adequately charge the jury as to the meaning and application of Georgia Code Annotated Section 27-2534.1(b)(7) was raised by Petitioner in his direct appeal to the Supreme Court of Georgia as Enumeration of Error No. 11. This argument was specifically rejected by the Supreme Court of Georgia which ruled that under the circumstances of Petitioner's case a limiting charge was not necessary.

2.) The failure of the trial court to adequately charge the jury as to the mitigating circumstances of Petitioner's case was raised by Petitioner in his direct appeal to the Supreme Court of Georgia as Enumerations of Error Nos. 9 and 10. This argument was specifically rejected by the Supreme Court of Georgia.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE GEORGIA SUPREME COURT, IN APPLYING GEORGIA CODE ANNOTATED SECTION 27-2534.1(b)(7) TO PETITIONER'S CASE WITHOUT REQUIRING A LIMITING CHARGE AT TRIAL HAS ADOPTED SUCH A BROAD CONSTRUCTION OF THE STATUTE AS TO VIOLATE THIS COURT'S RULING IN GODFREY v. GEORGIA AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

As this Court held in the recent case of Godfrey v. Georgia, 100 S.Ct. 1759 (1980), when a State seeks to impose the death penalty against an individual it must tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the penalty. In order to pass constitutional muster, a statute on its face and in its application:

> "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " Godfrey, supra, at 1764-1765. See Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976) (Opinion of STEWART, POWELL and STEVENS, JJ.); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (Opinion of STEWART, POWELL and STEVENS, JJ.).

In the case at bar, as in Godfrey, this Court is called upon to determine the validity of a death sentence entered pursuant to the determination of a jury that a murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," in contravention of Georgia Code Annotated Section 27-2534.1(b)(7) (Hereinafter "(b)(7)"), where the trial court failed to give any limiting charge to the jury or to provide any guidance in construing Section (b)(7).

In Petitioner's case, the trial court, in charging the jury during the penalty phase, twice repeated the wording of Section (b)(7) (T-812, 815), but never attempted to explain the significance of the words so as to channel the discretion of the jury (Appendix B). After deliberation, the jury returned and recommended that Petitioner be sentenced to death based upon their finding that:

> "The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, and/or aggravated battery to the victim." (Emphasis added.) (T-816).

Having had no effective instruction as to what they were required to find to sustain a death sentence under Section (b)(7), the jury made no specific findings of fact and merely parroted the language of the statute, not even bothering to amend the "and/or" and clarify which of the elements of Section (b)(7) they felt had been proven beyond a reasonable doubt. Such a generalized finding, based upon quoted statutory language alone, without any adequate limiting definition cannot be sustained. Stromberg v. California, 283 U.S. 359, 367-368 (1931).

While Petitioner was convicted and sentenced before this Court handed down its decision in Godfrey, the opinion of the Georgia Supreme Court came down after Godfrey was decided. The Supreme Court of Georgia was therefore compelled to impose a limiting construction upon Section (b)(7) in its opinion and it attempted, thereby, to belatedly correct the errors in the trial judge's charge and to supply a rationale by which the jury might have narrowly and constitutionally applied Section (b)(7).

As this Court held in Godfrey, supra, one of the vices of unguided jury application and construction of Section (b)(7) is that any preconceptions of what was contemplated by the statute might go uncorrected and might work their way into an illegal or ill-considered verdict. In the absence of any guidance to the jury at trial, any appellate court which reviews a death sentence imposed under Section (b)(7) will still be forced to engage in sheer speculation as to how the jury construed the statute. Godfrey, supra, at 1765. The efforts of the Supreme Court of Georgia to retroactively provide the jury with a constitutionally valid perspective on Section (b)(7) at the time of their sentencing deliberation is sheer speculation in violation of the dictates of this Court.

In Petitioner's case, the Supreme Court of Georgia ruled that as it was apparent to them that the second clause of Section (b)(7) was satisfied by the evidence, there was no need for the jury to have been given a limiting charge at trial. It is Petitioner's position that appellate review, especially in a capital case, cannot rectify the error at trial in the failure of the trial court to give a limiting charge. In the absence of any specific and precise findings by the triers of the facts, an appellate court may not lawfully make belated findings of fact on the basis of evidence in the record below and use these findings to correct or bolster a jury's ultimate conclusion. Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). The Supreme Court of Georgia should be precluded herein, as they were in Presnell, supra, from speculating upon what the jury did find, what they could have found and what they were authorized to find under the facts of the case. Speculation on appeal cannot be a constitutional substitute for recorded and specific findings of fact rendered by a properly instructed jury.

Also objectionable is the fact that while the Supreme Court of Georgia, in reviewing Petitioner's death sentence, attempted a narrow construction of Section (b)(7), its interpretation of certain terms is still unconstitutionally imprecise. The term "torture" as applied to Petitioner's case is so overly broad as to encompass any assault of lethal magnitude if the victim does not die immediately.

In summary, Petitioner respectfully submits that a death sentence based in whole or in part on Georgia Code Annotated Section 27-2534.1(b)(7) cannot be sustained if the trial court failed to provide any guidance to the jury as to the construction and application of that statute. Godfrey v. Georgia, supra; Patrick v. Georgia,[1] No. 79-6745, 49 U.S.L.W. 3371 (11-18-80); Hardy v. Georgia,[2] No. 80-5010, 49 U.S.L.W. 3371 (11-18-80); Thomas v. Georgia, No. 80-5266, 49 U.S.L.W. 3371 (11-18-80). In view of the above, Petitioner's death sentence must be set aside by this Court.

1-2: It should be noted in passing that in the Appendix to its opinion in Petitioner's case, the Supreme Court of Georgia relied upon both of these cases in support of Petitioner's death sentence, prior to this Court's actions which vacated and remanded the decisions.

II. THE FAILURE OF THE TRIAL COURT TO ADEQUATELY CHARGE THE JURY AS TO MITIGATING CIRCUMSTANCES IN THIS CAPITAL CASE DENIED PETITIONER DUE PROCESS OF LAW.

This Court has held that in order to prevent the death penalty from being inflicted in an arbitrary and capricious manner a jury must be properly advised of the mitigating circumstances presented by a defendant's case. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). As this Court has ruled:

> "(I)n capital cases, the fundamental respect for humanity underlying the Eighth Amendment ....requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. at 304.

The failure of the trial court in this case to provide the jury with any effective guidance in this area mandates that Petitioner's death sentence be set aside.

While the Supreme Court of Georgia has held in Spivey v. State, 241 Ga. 477, 479 (1978) that a trial court does not have to single out and name any mitigating circumstances in its charge, it is incumbent upon the court to explain the concept of mitigation to the jury in a clear manner so that they understand what factors they may consider. Georgia Code Annotated Section 27-2534.1(b) clearly sets forth the requirement in this language:

> "In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence...."

The Georgia Supreme Court construed the fact that Georgia law does not specify in detail what would constitute a mitigating circumstance to mean that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating, without

limitation or definition. Spivey, supra.

While this may be so, the practical effect may be to deny a jury effective guidance which they may follow in attempting to define what would constitute circumstances in mitigation. On the other hand, aggravating circumstances are singled out and written down for the jury to study during its deliberations. Such an unbalanced presentation is patently offensive to the spirit of Due Process.

In Roberts v. Louisiana, 431 U.S. 633 (1977), this Court singled out a number of mitigating circumstances which a jury might consider in passing sentence. These circumstances included:

> "the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance...." 431 U.S. at 637.

The jury in Petitioner's case was never presented with any such direction by the trial court, although the evidence clearly justified their consideration of a number of factors such as Petitioner's age, his lack of any prior convictions and his good reputation in his community. As this Court has noted, "(t)he idea that a jury should be given guidance in its decisionmaking is...hardly a novel proposition." Gregg v. Georgia, 428 U.S. at 192-193. In Gregg, supra, this Court paid notice to the Model Penal Code as an effective source of guidance to the sentencing authority. Id. at 193-195.

In the State of Georgia, therefore, a jury is given the naked instruction that they are authorized to consider in mitigation anything which the law authorizes them to consider, but they are never given any instruction which provides meaningful guidance as to what the law allows them to consider.

The trial court's charge in Petitioner's case was devoid of any effective guidelines. The language was so imprecise that a jury of laymen could not realistically have been expected to gather what they could and what they could not consider. This situation might have been remedied had the law or the charge alluded to the non-exclusive criteria of, for example, the Model Penal Code, but no such guidance was provided. A juror's hunch that a certain factor might be considered as mitigating is no substitute for an affirmative instruction from the bench that such a factor was indeed a proper consideration. Judicial allusion to guidelines or to the particular mitigating circumstances presented in Petitioner's case would have had the force of law in the minds of the jury and would have given them the necessary guidance to fairly consider Petitioner's case.

In view of the fact that the jury was not afforded proper guidance by the trial court on the question of mitigating circumstances, Petitioner's death sentence must be set aside.

CONCLUSION

For the above reasons this Court should issue a Writ of Certiorari and review the decision of the Supreme Court of Georgia.

Respectfully Submitted,

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APPENDIX A

In the Supreme Court of Georgia

Decided: OCT - 8 1980

36298. CAPE v. STATE.

NICHOLS, Justice.

Garnett Cape, the appellant, was convicted and sentenced to death by a jury in Franklin County Superior Court for the May 17, 1979, murder of Karen Dove. His case is now before this court on direct appeal and for mandatory review of the death sentence.

1. Summary of the evidence.

From the evidence presented at trial, the jury was authorized to find the following facts:

The appellant, a 56 year-old male, was the uncle of the victim's mother. He was well acquainted with the victim's family. The victim's father and the appellant had hunted and fished together often. He had socialized with the victim's family on many occasions, and had worked with the victim's brother. He had developed a close relationship with all the members of the family, including the victim, a 15 year old high school student.

Approximately three months prior to the murder, the appellant had been told by the victim's mother to stay away from the victim. The mother testified that the appellant "seemed a little too interested in her." The victim was also told to stay away from the appellant. In response, the appellant ceased visiting the family but continued to see the victim's father and brother at their places of employment.

The appellant had promised to buy the victim an expensive car. They had looked at the car together. On the 14th of

May, the appellant had signed a purchase order. He had asked for a delay in delivery in order to get funds from a Texas bank. It was later established at trial that the appellant did not have such an account.

On the morning of the murder, the appellant drove the victim and her friend, Tammy Lee Dickerson, to school. He talked to the victim alone in the car for a few minutes after her friend went into the school. The victim was last seen alive leaving school at approximately 3:15 p.m.

At approximately 4:45 p.m., the appellant came into the victim's brother's place of employment and told him he had "lost" his sister. The victim's brother noticed that appellant was frightened, nervous, and had cuts on his hands and scratches on his face.

The appellant explained that he had picked up the victim after school, and had taken her to the courthouse to get her birth certificate, which was required to enable her to obtain a learner's driving permit. He testified that she went into the courthouse but didn't come out, and although he had looked for her, she was missing.

The victim's brother then began to search for his sister. The appellant had the victim's brother drive him to see a classmate of the victim. Appellant asked her whether the victim was in a good mood that day. Thereafter, the appellant went to the victim's father and, in tears, told him the same story. In response, the victim's father told the appellant that, "You knowed you wasn't suppose to pick her up," and the appellant replied, "Yeah, I'll never bother her again, I'll never buy her nothing else."

It was established that the victim's mother had gotten the victim a birth certificate and learner's permit the day prior to the murder.

The victim's brother accompanied by Tammy Lee Dickerson and another young female continued to search for the victim.

He had gone to the appellant's house, but finding no one home had not entered. Later, the victim's brother and his companions returned to the appellant's house. He found a note on the back door which read, "Gone to Anderson. Garnett." The victim's brother then broke into the house through the front door. He found the front room and kitchen in an unusually neat and clean condition.

The victim's friend, Tammy Lee Dickerson, found the victim's body upon entering a bedroom. The victim had been beaten and stabbed to death. Her clothes were in disarray, so that she was partially nude. The body had been wrapped in a sheet of black plastic in such a manner that only the upper torso was exposed.

The local authorities were immediately notified. Close examination of the crime scene revealed blood stains on the kitchen cabinets, door and ceiling. Attempts had been made to remove them. A mop, towels and male clothing were found with blood stains on them. The defendant's watch, with blood stains on the band, was also found. The blood stains were of the same international blood type as that of the victim. A metal pipe belonging to the appellant was recovered and subsequently determined to be the weapon used to beat the victim.

The appellant was arrested that night as he drove through Hartwell, Georgia. The officers found a loaded pistol under the seat of appellant's car and the appellant later made the statement that "if he'd of known that the Hartwell Police would --had've done a good job of it and shot him, that he would've pulled his pistol up."

The appellant testified in his defense. He repeated the statement he told the victim's brother and father. He further testified that he later returned home and found the

victim lying face down and fully clothed in his kitchen; that he tried to wipe the blood from her face but became sick; that although he did not know if the victim was dead or alive he did not call anyone but instead left to go to his sister's house in Hartwell, Georgia, to tell her.

The evidence will be examined in more detail as necessary in addressing appellant's enumerations of error.

2. Enumerations of Error

1. Appellant first asserts that the trial court erred in admitting eight photographs of the victim's body. He argues that these photographs were cumulative of testimony of other witnesses, and were unncessarily prejudicial and inflammatory. This court does not agree. Each depicted the nature, extent and location of the wounds, the extent of the disarray of the victim's clothing, or were illustative of the crime scene. It is well settled that photographs which are relevant and material to issues in the case are not excludable on the grounds that they would inflame the minds of the jurors, nor are they excludable on the ground that they are corroborative or cumulative of other evidence. Tucker v. State, 245 Ga. 68 (263 SE2d 109); Mooney v. State, 243 Ga. 373 (254 SE2d 337)(1979); Green v. State, 242 Ga. 261 (249 SE2d 1)(1978), rev. other grounds 442 US 95 (99 SC 2150, 60 LE2d. 738)(1979).

2. After appellant was arrested and given his Miranda warnings, the authorities asked him if he wanted to make any statements. He replied to the effect that he'd rather not; that he'd rather talk to the Sheriff when he got to the jail. The trial court admitted this testimony. Appellant argues that the testimony complained of was an impermissable comment on his right to remain silent and therefore ran afoul of the rule in Doyle v. Ohio, 426 US 610 (96 SC 2240, 49 LE2d 91)(1976). Pretermitting the question of whether or

not defense counsel preserved the point by proper objection during the trial, this court holds there is no merit in appellant's contention that the testimony denied him his right to remain silent.

The district attorney did not stress appellant's silence in an attempt to infer guilt, nor was the jury ever told that the appellant's silence could be used for impeachment purposes, much less as evidence of guilt. The testimony was elicited by the state upon direct examination and was not used for impeachment purposes, as was the case in Doyle v. Ohio, supra.

The comment of the witness was not directed to any particular statement or defense offered by the appellant. The election not to make a statement, but to wait and talk to the sheriff, was made after the incriminating statement about appellant's having considered whether to allow the police to shoot him. Furthermore, the comment on temporarily remaining silent was made during a narrative on the part of the authorities of a course of events. The remark apparently was not intended to, nor did it have the effect of, being probative on the guilt or innocence of the defendant. See Smith v. State, 140 Ga. App. 385 (231 SE2d 83) (1976). To reverse a conviction, the evidence of the defendant's election to remain silent must point directly at the substance of the defendant's defense or otherwise substantially prejudice the defendant in the eyes of the jury. No such situation exists here. Smith v. State, 244 Ga. 814 (262 SE2d 116)(1979). Compare Clark v. State, 237 Ga. 901 (230 SE2d 277)(1976). Furthermore, appellant's exculpatory story was "transparently frivolous" and the evidence of guilt is overwhelming. Chapman v. U.S., 547 F.2d 1240 (5th Cir. 1977).

3. In his third enumeration of error, the appellant asserts that the trial court erred in allowing the sheriff,

who had been listed as the prosecutor, to testify after the rule of sequestration had been invoked. Appellant argues that the sheriff should have been called as the state's first witness, although no objection was made at the time the rule was invoked as to sequence of witnesses. Upon assertion by the district attorney that the witness needed to be called at that time in order to preserve the orderly presentation of the evidence, the trial court specifically exercised its discretion and allowed the witness to testify. This enumeration of error is without merit. Fouts v. State, 240 Ga. 39 (239 SE2d 366)(1977); Larkins v. State, 230 Ga. 418 (197 SE2d 367)(1973); see O'Dillon v. State, 245 Ga. 342 (265 SE2d 18)(1980).

4. As part of his defense during the guilt-innocence phase of the trial, appellant introduced evidence of good character. The trial court upon its own motion held defense counsel to the proper questions. Appellant contends in his fourth enumeration of error that the judge's remarks amounted to an impermissible expression of opinion. As specific examples the trial court ruled that one question was leading. Later, the trial court stopped a witness from testifying by stating, "she said she's not familiar with it."

"It is the duty of the trial judge to control the trial of the case and to insure a fair trial to both sides on the disputed issues in the case. Sometimes this requires interference by the court with the conduct of counsel or with a witness in the trial." Dyke v. State, 232 Ga. 817, 825 (209 SE2d 166) (1974). The trial judge has broad discretion in handling such matters and such discretion will not be interfered with unless manifestly abused. Dyke v. State, supra. This court has carefully examined the comments of the trial judge and has concluded that the trial judge did not abuse his discretion.

Nor do we find an improper expression or intimation of his opinion as to evidence of the guilt of the accused. Thomas v. State, 240 Ga. 393 (242 SE2d 1)(1977).

5. Appellant complains in his fifth enumeration of error that the trial court erred in failing to grant a mistrial after a witness testified to specific acts of bad character. The state in response to the defendant's character witnesses called his former daughter-in-law and elicited testimony about sexual advances made to her by the defendant. Defense counsel cross-examined the witness and elicited responses favorable to the defense. However, after two other witnesses had testified, the defense counsel objected at a bench conference to her testimony and moved for a mistrial. While refusing to grant a mistrial, the trial judge agreed that the testimony was inadmissible and instructed the jury to disregard it. By failing to object contemporaneously with the testimony, and by proceeding to cross-examine the witness, trial counsel waived the error. However, pretermitting waiver, the decision of whether to grant a motion for mistrial lies within the sound discretion of the trial judge, and his judgment will not be disturbed on appeal absent a showing of abuse of discretion. Sims v. State, 243 Ga. 83 (252 SE2d 501)(1979); Patterson v. State, 239 Ga. 409 (238 SE2d 2) (1977). Under the circumstances of this case, we find no abuse of discretion. See Tucker v. State, supra.

6. During the trial, the state offered into evidence the sheet of black plastic upon which the body had been found. It was brought into the courtroom in a plastic bag. The evidence had a strong, nauseating odor which permeated the courtroom. Defense counsel objected on the grounds of prejudice and relevancy. After its admission over objection, defense counsel agreed that the sheet of plastic would not

be removed from the bag, but the sheriff was allowed to testify as to the bag's content. The evidence was material and relevant. It was part of the crime scene and supported the state's theory of concealment and intent to dispose of the body. Being relevant evidence, its admission was not error. See Green v. State, supra, division 1 of this opinion.

7. In his seventh enumeration of error, appellant contends that the trial court erred in instructing the jury during the guilt-innocence phase of the trial as follows:

> ". . . you are made by the law the exclusive judges of the credibility of the witnesses and the weight you shall give their testimony. That applies to all witnesses in this case, every person that sat in this chair, everyone. It applies to all of them."

The trial judge then instructed the jury not to consider evidence or testimony which had been ruled out or stricken from the record. Appellant argues that such a charge gave conflicting rules of law and was erroneous. Considering the charge as a whole, the instructions are not conflicting. This enumeration of error is without merit.

8. In his eighth enumeration of error, appellant asserts that the court erred in instructing the jury during the guilt-innocence phase of the trial as follows:

> "Now, ladies and gentlemen of the jury, a conviction must not rest upon suspicion, conjecture, or possibility of guilt. Where all the facts and circumstances of the case and all reasonable deductions therefrom present two theories, one of innocence and the other of guilt, and if the jury so finds, the jury would be authorized and should acquit the defendant. On the other hand, should you find that the state has proven beyond a reasonable doubt every material allegation in the indictment, in such case you would be authorized and should convict the defendant."

Appellant argues that the emphasized portion of the instruction restricts the jury to a consideration of the State's evidence, and the fact that the judge later instructed the jury to consider the defendant's evidence in rendering a verdict did not correct the alleged erroneous instruction, nor remove the injury resulting therefrom.

In support of his argument, the appellant relies upon Salisbury v. State, 221 Ga. 718 (146 SE2d 776)(1966), hereinafter referred to as the first Salisbury case. The second Salisbury case, 222 Ga. 549 (150 SE2d 819)(1966), dealt with other matters, whereas the third Salisbury case, 223 Ga. 414 (156 SE2d 48)(1967), is in point.

In the first Salisbury case, this court held that to charge that "if the state has proved these material allegations beyond a reasonable doubt, the defendant on trial would be guilty and it would be your duty to say so in your verdict" was error. It was held that this excerpt restricted the jury to consideration of only the State's evidence even though the judge later instructed the jury to consider the defendant's evidence in arriving at a verdict.

However, we find that the case at bar is clearly distinguishable from the first Salisbury case, supra, and is controlled by the third Salisbury case, supra. In the case at bar, the excerpt must be construed in light of the preceding sentence which instructed the jury to consider all the facts and circumstances of the case in determining if there were conflicting theories. It repeatedly has been held that upon consideration of whether a portion of the charge complained of was erroneous, the reviewing court should examine the entire charge. If any part of the charge plainly tempers and modifies another, so that the ultimate sense and impression are correct, there is no error. Prior to giving the excerpt complained of the trial court charged on reasonable doubt, burden of proof and presumption of innocence. As part of its charge on burden of proof (the theory of law involved in the excerpt complained of) the trial court charged that "in determining whether the state has carried this burden, you would consider all of the evidence which has been introduced to you here during the trial."

Therefore, upon examination of the entire charge it is clear that the jury could not have failed to understand that it was bound to consider all of the evidence adduced upon the trial in determining whether to convict or acquit the accused. Favors v. State, 228 Ga. 196 (184 SE2d 568)(1971); Breland v. State, 134 Ga. App. 259 (214 SE2d 186)(1975). See Anderson v. State, 226 Ga. 35 (172 SE2d 424)(1970).

9. In enumerations of error nine and ten, appellant contends that the trial court erred in its instructions to the jury during the sentencing phase of the trial in that the court failed to define adequately the term "mitigation". He further contends that the trial court erred in failing to specify mitigating circumstances and provide the same in writing to the jury.

The trial judge adequately instructed the jury as to the definition of "mitigating circumstances." "Mitigation" is a word of common meaning and usage and it is not error to charge its definition. See Dyke v. State, supra; Smith v. State, 236 Ga. 5 (222 SE2d 357)(1976).

It is not required that specific mitigating circumstances be singled out by the court in giving its instructions to the jury. Tucker v. State, 244 Ga. 721 (261 SE2d 635)(1979); Collier v. State, 244 Ga. 553 (261 SE2d 364)(1979) and cites. Nor is there a right to have written instructions sent to the jury as to mitigating circumstances. Tucker v. State, supra; Collier v. State, supra; Spraggins v. State, 243 Ga. 73 (252 SE2d 620)(1979); Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979).

10. The remaining enumerations of error more properly address themselves to sentence and will be considered in our sentence review.

3. Sentence Review

In our sentence review, we have considered the aggravating circumstance found by the jury and the evidence concerning the crime and the defendant. We have reviewed the sentence as required by Ga. L. 1973, p. 159 et seq (Code Ann. § 27-2537(c)(1-3)) as we have in each case involving the death penalty under this statute. We find that the evidence factually substantiates the verdict and supports a finding of guilt beyond a reasonable doubt. Jackson v. Virginia, ___US___ (99 SC 2781).

11. Appellant asserts that the sentence of death was imposed under the influence of passion, prejudice and other arbitrary factors because of the cumulative effect of incompetent and inadmissible evidence submitted by the state. He also argues that the jury was impassioned because of the particularly horrible nature of the crime and the age of the victim. After a through review of the transcript and record in this case as mandated by our statute, we do not agree. The evidence submitted by the state being found admissable, appellant's enumeration has no merit. Nothing in the record indicates that the jury abdicated its oath and decided sentence upon passion, prejudice or other arbitrary factors. Rather, the finding of the aggravating circumstance set forth below was a logical and rational result based upon the vile, horrible and inhuman nature of the crime. See division 13 below. The appellant attempts to assert the "Private Slovik Syndrome" for the first time on appeal. This argument has been raised before and decided adversely to appellant. House v. Stynchcombe, 239 Ga. 222 (236 SE2d 353)(1977). We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

12. In his final enumeration of error, the appellant asserts that the death penalty must be set aside because the trial court's instructions to the jury in the sentencing phase of the trial did not provide guidance in the interpretation of Code Ann. 27-2534.1(b)(7), citing the recent case of Godfrey v. Georgia, 4 LW 441 (8/19/80). While the trial court did not give a limiting charge on § 27-2534.1 (b)(7), we hold that a limiting charge was not required under the facts of this case. Godfrey v. Georgia, supra; Hance v. State, ____Ga. ____, Case No. 36012, decided June 24, 1980. As the Supreme Court of the United States said in Godfrey v. Georgia, supra, "the validity of the petitioner's death sentence turns on whether, in light of the facts and circumstances of the murders. . ., the Georgia Supreme Court can be said to have applied a constitutional construction of [27-2534.1(b)(7)]." As noted in Godfrey v. Georgia, supra, the jury there returned a finding that the murder was "outrageously or wantonly vile, horrible and inhuman." Torture or aggravated battery was not found as in the case at bar. See division 13 below. Therefore, the Supreme Court of the United States was required to speculate as to the jury's interpretation of the first clause of the statute. As that court said, "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death penalty."

However, in the case at bar, the jury's finding of the second clause of the statute is supported by the evidence beyond a reasonable doubt, and speculation as to the jury's interpretation of the statute by the reviewing court is not required, thereby allowing rational review of the death sentence. Godfrey v. Georgia, supra, is therefore distinguishable from the case at bar, and under the particular facts of this

case a limiting charge was not required. See Hance v. State, supra; Harris v. State, 237 Ga. 718 (230 SE2d 1)(1976); Lamb v. State, 241 Ga. 10 (243 SE2d 59)(1978). This enumeration of error is without merit.

13. The jury found the following aggravating circumstance:

"The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind and/or aggravated battery to the victim."

Under the evidence in this case, the victim was beaten with an iron pipe. She sustained multiple skull fractures and the force of the attack was so great that the skull was fractured almost in half. The victim sustained bruises on the left shoulder and neck probably as a result of being choked. The tongue and upper lip were bruised and part of the lower lip was swollen. After the victim sustained the head injuries, she was stabbed five times in the back and twice in the chest. Death ensued from the loss of blood.

When the body was found, it was in a partial state of undress. One breast was exposed and the pants the victim was wearing were unzipped. Forensic evidence suggested the presence of seminal fluid in the oral cavity, but was not conclusive. However, the state of undress, bruising about the mouth, and the suggested presence of seminal fluid would authorize a finding of serious sexual abuse. The victim was a 15 year old female child.

By any rational standard the murder was outrageously or wantonly vile, horrible or inhuman. In that respect this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. Hance v. State, supra; Patrick v. State, 245 Ga. 417 (265 SE2d 553)(1980). The victim did not die instantaneously, and while she was distantly related to the appellant, this is not a domestic

murder. Nor did the victim give appellant any reason to assault her, and she was not subjecting the appellant to any emotional trauma. The appellant made an elaborate attempt to hide the crime. See Godfrey v. Georgia, supra. In Hance v. State, supra, this court set out standards which must be met in order to constitutionally apply § 27-2534.1(b)(7) in light of Godfrey v. Georgia, supra. We held that torture, as the term is used in the statute, occurs when the victim is subjected, as in this case, to serious physical abuse before death. We also held that serious sexual abuse may be found to constitute serious physical abuse. The evidence supports a finding of serious physical abuse and serious sexual abuse constituting serious physical abuse. A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind. The age and physical characteristics of the victim may be considered in determining depravity of mind.

We find that the evidence factually substantiates and supports the finding of the statutory aggravating circumstances and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

We have throughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (240 SE2d 37)(1978), and Hawes v. State, 240 Ga. 327 (240 SE2d 833)(1978).

The murder was a savage sexual assault upon a young child. It was not a crime of passion such as to mitigate the imposition of the death penalty as appellant asserts. The fact that the victim knew and trusted the appellant far from mitigating the crime, as appellant argues, makes the murder more outrageously or wantonly vile, horrible or inhuman.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. Contrary to appellant's position, juries have given the death penalty in cases in which the defendant had no prior criminal record. Tucker v. State, 244 Ga. 721 (261 SE2d 635)(1979); Bowen v. State, 241 Ga. 492 (246 SE2d 322)(1978); House v. State, 232 Ga. 140 (205 SE2d 217)(1974).

We find that the following similar cases listed in the appendix support the affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

APPENDIX

1. House v. State, 232 Ga. 140 (205 SE2d 217)(1974)
2. Gibson v. State, 236 Ga. 874 (225 SE2d 63)(1976)
3. Griggs v. State, 241 Ga. 317 (245 SE2d 269)(1978)
4. Presnell v. State, 241 Ga. 49 (243 SE2d 496)(1978)
5. Johnson v. State, 242 Ga. 649 (250 SE2d 394)(1978)
6. Ruffin v. State, 243 Ga. 95 (252 SE2d 472)(1978)
7. Collins v. State, 243 Ga. 291 (253 SE2d 729)(1978)
8. Bowen v. State, 244 Ga. 495 (260 SE2d 855)(1979)
9. Tucker v. State, 244 Ga. 721 (261 SE2d 635)(1979)
10. Patrick v. State, 245 Ga. 417 (265 SE2d 562)(1980)
11. Thomas v. State, 245 Ga. 688 (266 SE2d 499)(1980)

going to live that terrible incident every day of it.

And I am begging you as human beings, don't electrocute this man. Let's stop the killing.

Thank you.

* * *

THE COURT: All right, Mr. Frank, let the jury go to the jury room for a moment.

Everyone remain seated now.

(...Jury leaves courtroom. After a brief recess, the proceedings continue as follows, before the jury...)

CHARGE BY THE COURT

Mr. Tise, Mr. Keeble, Ladies and Gentlemen of the Jury, Mr. Foreman: We have, of course, been trying the case of the State of Georgia versus Garnett William Cape. A verdict of guilty has been returned into this Court; we have proceeded with the trial into the Sentencing Phase of the trial. It now becomes my duty, ladies and gentlemen, as presiding Judge in this case, to instruct you as to the law concerning the sentencing phase of this case.

The instructions that I gave you earlier today, which you'll remember, and the rules of law outlined to you in this portion of the instruction apply also to your deliberation in this case as to the penalty.

Now, ladies and gentlemen, the law of Georgia provides that the death penalty may be imposed in certain cases

provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance. Now, in this case, ladies and gentlemen, the one that we are trying, the State contends that the offense of murder for which the accused, Garnett William Cape, has been convicted was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim, Karen Dove. Such a circumstance is defined as a statutory aggravated circumstance under the law of this State.

Now, ladies and gentlemen of the jury, you have found this Defendant guilty of the offense of murder, and you may recommend to this Court one of two sentences as punishment. If you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances as contended by the State and as I have defined for you-- if you do so find, you may recommend that this Defendant be put to death by adding to your verdict: "We recommend death, and find the following aggravated circumstances beyond a reasonable doubt," and you must set forth in writing the aggravated circumstance which you find to exist. If you do add that recommendation, the accused will be sentenced to be put to death in the manner provided by law, which in this State is electrocution.

The other punishment which you may recommend to this Court in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this Defendant should be put to death, you may leave your verdict as it is, that is: "We, the jury, find the Defendant guilty," and the effect of this sentence would be that the Court would sentence this accused to life imprisonment.

Now, ladies and gentlemen of the jury, you should consider all the evidence submitted to you in both phases of the trial of this case in arriving at your verdict as to sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Now, ladies and gentlemen of the jury, even if you find beyond a reasonable doubt that the State has proved the existence of aggravating circumstance or circumstances in this case which would justify the imposition of the death sentence, you are not required to recommend that the accused be put to death. You would be authorized under these circumstances to recommend the death penalty but you are not required to do so. You shall consider, ladies and gentlemen, any mitigating circumstances. Mitigating circumstances are those circumstances which in fairness and mercy shall be considered by you in fixing the punishment. You may if you see fit-- and this is a matter entirely within your discretion-- provide for a life sentence for the accused based upon any

mitigating circumstance or reason satisfactory to you, or without any reason, if you see fit to do so. You may recommend life imprisonment even though you have found the aggravating circumstance given to you in this Charge to have existed beyond a reasonable doubt.

The law vests the exclusive right with the jury to either make or withhold a recommendation for the death sentence. Of course, if the State has failed to prove beyond a reasonable doubt that the offense was committed under the aggravated circumstance described to you, you are not authorized to recommend the death penalty. Without such a finding, the death penalty cannot be imposed. In that event, you would leave your verdict in the form which you have returned it, that is: "We, the jury, have found the Defendant guilty," the effect of which would be that the Court would sentence this Defendant to life in prison.

The law requires that the presiding Judge give to the jury certain instructions in writing, and that the jury, if its verdict be a recommendation of death, shall designate in writing the aggravated circumstance with which it finds to exist beyond a reasonable doubt. I will furnish you a written copy of this portion of the Charge, and I charge you that in the event that you recommend death as the penalty in this case that you must write out the recommendations and your finding as to the statutory aggravated circumstance in

the form which I have given you in these instructions.

Ladies and gentlemen of the jury, I have a sheet here on which is typed the caption of the case. "It is the contention of the State that the aggravating circumstance in this case is as follows: The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This is the wording you would find if you so find in your verdict.

The form of your verdict-- I have fixed a form for you. It says, "We, the jury, recommend and fix the Defendant's punishment as follows: One, life in prison; two, death." You will circle one or the other. In the event death is recommended and fixed as punishment, complete the following: "We find the following aggravating circumstance." You would date it; you would write in the circumstance that you find, the aggravating circumstance, and date it and have it signed by your Foreman.

Now, ladies and gentlemen of the jury, I charge you again that you would consider all the evidence in the trial stage as well as in the sentencing stage, and you would also consider each and every instruction that I gave you previously in this case.

Now, ladies and gentlemen of the jury, you may retire and consider in this case what the punishment shall be. You

may retire.

(...Jury retired to jury room for deliberation, after which they returned and the following transpired...

THE COURT: Mr. Foreman, have y'all reached a verdict?

FOREMAN: Yes, Your Honor, we have.

THE COURT: All right, give it to the Bailiff and let him deliver it to the Court.

We'll ask the Clerk to publish the verdict, and I will ask all of you to remain silent after it's read.

CLERK: "State of Georgia, County of Franklin; State versus Garnett Cape. Punishment Verdict. We, the jury, recommend and fix the Defendant's punishment as follows: Death. We further find the following aggravating circumstances: The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, and/or aggravated battery to the victim. This 8th day of November, 1979." Signed, "Jack Gober, Jr., Foreman."

THE COURT: Now, ladies and gentlemen of the jury, it's been a long, hard trial. You've made your decision. Go home now and dismiss it from your mind. You've served this Court and your County and your State by serving on this jury. I express my personal thanks to you for your patience, your hard work, and I want you to know I officially and personally thank you.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARNETT WILLIAM CAPE,

Petitioner,

-V.-

THE STATE OF GEORGIA,

Respondents.

On Writ of Certiorari

To the Supreme Court of Georgia

MOTION TO PROCEED IN FORMA PAUPERIS

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ATTORNEYS FOR PETITIONER

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARNETT WILLIAM CAPE,

Petitioner,

-V.-

THE STATE OF GEORGIA,

Respondents.

NOTICE OF MOTION TO PROCEED IN FORMA PAUPERIS

TO: Mr. Michael Rodak
Clerk of the Court
Supreme Court of the United States
Washington, D.C.

Mr. Arthur K. Bolton
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PLEASE TAKE NOTICE that the undersigned attorney for Petitioner GARNETT WILLIAM CAPE hereby moves this Court for an Order allowing Petitioner to proceed in forma pauperis, and to have waived all attendant costs of filing and processing his action before this Court. Petitioner will rely upon the attached affidavits in support of this motion.

/s/ Melvin L. Wulf

MELVIN L. WULF
Clark, Wulf, Levine & Peratis
113 University Place
New York, New York
ATTORNEY FOR PETITIONER

Dated: December 5, 1980

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

GARNETT WILLIAM CAPE,

Petitioner,

-V.-

THE STATE OF GEORGIA,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Comes the Petitioner, GARNETT WILLIAM CAPE, by Counsel, MELVIN L. WULF, and moves this Honorable Court pursuant to 28 U.S.C. Section 1915 for permission to proceed in forma pauperis in filing his petition for a Writ of Certiorari. Affadavits in support of this motion are attached hereto.

/s/ Melvin L. Wulf

MELVIN L. WULF
Attorney for Petitioner

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

GARNETT WILLIAM CAPE,

Petitioner,

-V.-

THE STATE OF GEORGIA,

Respondents.

AFFIDAVIT IN SUPPORT
OF MOTION TO PROCEED IN FORMA PAUPERIS

I, MELVIN L. WULF, do swear upon my oath and depose and say:

1. I am an attorney-at-law and am a member of the Bar of the Supreme Court of the United States.

2. I am the attorney of record for Petitioner in the above-entitled action.

3. The Petitioner moves this Court to authorize the commencement of this action without pre-payment of fees and costs and that he not be required to give security therefor.

4. The Petitioner is poor, without property or employment and is unable to pay said fees and costs or furnish security as he is currently incarcerated in the State of Georgia.

5. The Petitioner is a citizen of the United States.

6. The Petitioner verily believes that his rights under the Constitution of the United States were violated and that he is entitled to redress in this Court.

7. Accordingly, Petitioner prays that this Court grant permission for him to proceed in forma pauperis.

8. I declare under penalty of perjury that all of the foregoing is true and correct to the best of my knowledge.

/s/ Melvin

MELVIN L. WULF

Dated: December 5, 1980

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARNETT WILLIAM CAPE,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, GARNETT WILLIAM CAPE, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No V

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 5-13-79 appx. 600.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

   a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Garnett William Cape

GARNETT WILLIAM CAPE

STATE OF GEORGIA
COUNTY OF Butts

SUBSCRIBED AND SWORN TO
before me this the 4 day of Nov., 1980.

Carol Logsdon

My Commission expires:
Notary Public, Lamar Co., Ga.
My Commission Expires SEPT. 20, 1983

CERTIFICATE OF SERVICE

I, JERRY KAY, hereby certify that I have caused true and accurate copies of the attached Motion to Proceed In Forma Pauperis to be served upon Mr. Arthur K. Bolton, Attorney General for the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334 (Attn: Mary Beth Westmoreland) and Mr. J. Cleve Miller, District Attorney for the Northern Judicial Circuit of Georgia, P.O. Box 247, Elberton, Georgia, 30635, by placing said copies in properly addressed envelopes with sufficient postage affized thereon and depositing said envelopes in a U.S. Postal Service box.

Jerry Kay

Newark, New Jersey
Dated December 5, 1980

Cm &

NO. 80-5854

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

GARNETT WILLIAM CAPE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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10

QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia properly found that no limiting instructions were required to be given by the trial court during the punishment phase in regard to Ga. Code Ann. § 27-2534.1(b)(7).

2.

Whether the trial court properly charged the jury concerning mitigating circumstances during the punishment phase of Petitioner's trial.

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NO. 80-5854

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GARNETT WILLIAM CAPE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Garnett William Cape, was indicted in Franklin County, Georgia during the October Term, 1979, for the murder of Karen Dove. (R. 4, 5). Following a trial by jury, Petitioner was found guilty and the jury imposed the death penalty. The jury imposed the death penalty based on the existence of the seventh aggravating circumstance in the Georgia sentencing procedure, that is Ga. Code Ann. § 27-2534.1(b)(7).

The evidence at trial showed that the Petitioner, a fifty-six year old male, was the uncle of the victim's mother. He was also well acquainted with the victim's family. He had developed a close relationship with all members of the family, including the victim, a fifteen year old high school student.

Approximately three months prior to the murder, the victim's parents, James and Linda Dove, asked Petitioner not to come around their house or Karen any longer. They also asked their daughter to stay away from the Petitioner. Mrs. Dove testified at trial that Petitioner seemed "too interested" in Karen and was acting like a boyfriend toward her. Mr. Dove testified that Karen did not display the same attitude toward the Petitioner. (T. 478). Approximately two weeks prior to the murder, Petitioner was talking to the victim's brother about buying a car for her.

On May 12, 1979, Petitioner went to a car dealership and stated that he wanted to buy a car for his niece. He signed an order for a car costing over $8,000.00. The next day, Petitioner took the victim to the dealership to see the car. On Monday, he informed the dealership that his money was being wired from a bank in Texas and that he would pick up the car on Thursday.

On the morning of May 17, 1979, Petitioner took the victim and a friend of hers to school. Petitioner picked the victim up from school at 3:15 p.m. that day. At 4:45 p.m. Petitioner went to a hardware store where the victim's brother worked. Petitioner told Ronald Dove that he had taken Karen to get her birth certificate at the courthouse in Carnesville, Georgia, and that she never came back. The victim's brother noticed that Petitioner had cuts on his hand and scratches on his face at that time. Various other members of the community and the victim's family were told of the alleged disappearance of Karen Dove.

Around 6:30 p.m., the victim's brother and two friends went to the Petitioner's house. There was a note on the door stating that he had gone to Anderson. The three individuals unlocked the front door through a broken window pane. A chair had been propped up against the front door from inside. Clothes were scattered around the first bedroom in the house. A string of clothes was hanging across another door in the second bedroom. The three individuals saw the body of Karen Dove lying on a piece of black plastic on the floor. The black plastic covered the body of the victim to the waist.

After an autopsy was conducted, Dr. Dawson determined that there were multiple wounds on the head, including five lacerations scattered about the scalp, an incized wound in front of the left ear, contusions over both eyes, ears and sides of the head, multiple fractures to the skull and bruising on the tongue and lips. (T. 298, 299, 305). The victim also suffered five major stab wounds in the left side of the back and two stab wounds in the front chest. The stab wounds penetrated the pleural cavity, lungs and heart. Other wounds included an abrasion on the elbow, a contusion on the left shoulder, and two ecchymotic hemorrhages on the neck. The cause of death was most directly related to the loss of blood. An iron pipe found in the house fit some of the wounds and could have caused the blows to the head. Evidence indicated that injuries to the face and head occurred prior to the stab wounds and that the victim was probably alive at the time the wounds were inflicted.

Further tests conducted by the State Crime Lab weakly suggested the presence of seminal fluid on the oral swabs taken from the victim. Hair found on the end of the iron pipe was found to be similar to that of the victim.

The Petitioner testified in his own behalf and again asserted that the victim disappeared from the courthouse. Various witnesses testified in mitigation concerning Petitioner's character both at the guilt-innocence phase of the trial and the punishment phase.

The jury found the defendant guilty of murder. The jury also found that "the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind and/or aggravated battery to the victim". The jury imposed the death penalty based on this finding.

Appellant's Motion for New Trial was denied and a Notice of Appeal was filed with the Supreme Court of Georgia on March 25, 1980. After briefs were presented, and oral argument was conducted, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence on October 8, 1980. Cape v. State, 246 Ga. 520, _S.E.2d_ (1980). Among other issues, the Supreme Court of Georgia considered the two issues raised by the instant petition. Petitioner now seeks review in this Court of his conviction and sentence.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT NO LIMITING CHARGE WAS REQUIRED DURING THE PUNISHMENT PHASE OF PETITIONER'S TRIAL IN REGARD TO THE AGGRAVATING CIRCUMSTANCE SET FORTH IN GA. CODE ANN. § 27-2534.1(b)(7).

After Petitioner's conviction, the trial court conducted a sentencing hearing during which various evidence was presented to the jury. The Court subsequently charged the jury that to impose the death penalty, they must find the existence of a statutory aggravating circumstance beyond a reasonable doubt. The only aggravating circumstance presented in the instant case was that set forth by Ga. Code Ann. § 27-2534.1(b)(7), that is, "The offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim." This is also the manner in which the code section was charged to the jury. (T. 812). The Court charged the jury thoroughly on the form of its verdict and explained the effect of mitigating circumstances. No specific definitional instructions were given in regard to the seventh aggravating circumstance.

Petitioner asserts before this Court, as he did in a supplemental brief to the Supreme Court of Georgia, that the trial court should have been required to give a limiting charge on this aggravating circumstance. Petitioner relies on this Court's holding in Godfrey v. Georgia, 100 S.Ct. 1759 (1980), in which this Court considered the seventh aggravating circumstance.

Although this case was tried before this Court's decision in Godfrey supra, the decision of the Supreme Court of Georgia was not rendered until after the Godfrey decision. The Supreme Court considered the present allegation raised by the Petitioner and determined that under Georgia law, no such limiting instruction was required.

This Court's decision in Godfrey, supra, considered the question of the validity of a death sentence and whether, in light of the facts and circumstances of the murders in that case, the Supreme Court of Georgia applied a constitutional construction of Ga. Code Ann. § 27-2534.1(b)(7). Godfrey, supra, at 1762. The Court in Godfrey was faced with a different circumstance from the instant case. In Godfrey, the jury merely returned a finding that the offense of murder was outrageously or wantonly vile, horrible or inhuman. No finding was made referring to aggravated battery or torture. In the present case, the jury returned a finding of the entire aggravating circumstance including the provisions relating to torture or aggravated battery. The Supreme Court of Georgia found that there was sufficient evidence for the jury to find this aggravating circumstance beyond a reasonable doubt.

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court upheld the constitutionality of the Georgia death penalty scheme, including the aggravating circumstance attacked in the instant case. Even in the decision in Godfrey, this Court continued to find the seventh aggravating circumstance constitutional on its face. In Godfrey, the question was addressed solely to the construction applied by the Supreme Court of Georgia.

Petitioner has asserted that there was no explanation given for any of the words used in the seventh aggravating circumstance. No such requirement was implemented by this Court in Godfrey nor has the Supreme Court of Georgia ever set forth such a requirement. The Supreme Court of Georgia thoroughly considered the seventh aggravating circumstance in its recent decision of Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). In Hance, the Court noted that the phrases in the first portion of the statute, "outrageously or wantonly vile, horrible or inhuman" have a common meaning and are used to distinguish murders for which the death penalty is not appropriate. The Court also noted the plain meaning of the statute requires that the murder not only be outrageously or wantonly vile, horrible or inhuman, but also that there be an aggravated battery to the victim, torture of the victim or depravity of mind of the particular defendant. The Court then went on to explain the meaning of aggravated battery, torture and depravity of mind.[1]

As noted by the Supreme Court of Georgia in the instant case, Petitioner's case presents one clearly distinguishable from that of the case in Godfrey. The entire statutory aggravating circumstance was returned by the jury in the instant case, whereas, the jury in Godfrey only found that the murder was outrageously or wantonly vile, horrible or inhuman. In Godfrey, this Court found that there was nothing in the latter phrase to show any restraint in the infliction of the death penalty. The Supreme Court of Georgia went on to note that the second portion of the aggravating circumstance, that is, that portion requiring a finding of torture,

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1/ A petition for certiorari has been filed in this Court in Hance, supra, although the issue of the seventh aggravating circumstance was not presented to this Court.

aggravated battery, or depravity of mind, would be sufficient to support a finding of the death penalty if there was sufficient evidence to support the jury's finding beyond a reasonable doubt of one of those factors. In the instant case, the Court found that the jury's finding of the second clause of the statute was clearly supported by the evidence beyond a reasonable doubt and that there was no need to speculate as to the jury's interpretation of the statute in the instant case. Clearly, this case does not present one in which a limiting instruction would have been required. The review of the Supreme Court of Georgia on direct appeal clearly shows that the jury's finding was supported by the evidence and that the infliction of the death penalty was not arbitrary or capricious.

Petitioner cites several decisions from this Court in an attempt to have this Court once again consider the seventh aggravating circumstance. The instant case clearly does not present a situation like that presented to this Court in Stromberg v. California, 283 U.S. 359 (1931). In Stromberg, the jury had merely made a generalized finding and did not specify which portion of a statute it was relying on. The state court in Stromberg had even noted that a portion of the statute might be unconstitutional. In the instant case, the jury made a specific finding of the seventh aggravating circumstance. The mere fact that the second portion of that statutory provision is worded in the disjunctive, does not make the jury's finding a generalized one.

Petitioner also cites certain holdings by this Court in an argument that an appellate court cannot make belated findings of fact to support a jury's conclusion. This is clearly not what the Supreme Court did in the instant case. The Supreme Court of the State of Georgia is charged with review of the aggravating circumstances found by the jury. The Supreme Court of Georgia has a statutory duty to consider whether the evidence supports the jury's or judge's finding of the aggravating circumstance under Ga. Code Ann. § 27-2537(c)(2). The Court did not make belated factual findings, but merely considered the evidence as presented to the jury and determined that there was sufficient evidence to support its verdict. This is no different from a Court considering the sufficiency of the evidence to support a conviction on direct appeal.

Petitioner finally asserts that even after the elaborate review by the Supreme Court of Georgia, the Court's interpretation of the term "torture" is overly broad as applied to Petitioner's case. Respondent asserts that the word torture is one of common understanding by the general public and would not require a specific definition in a jury charge. Furthermore, the Supreme Court of Georgia determined in Hance, supra that torture would occur when a victim is subjected to serious physical abuse before death. Hance, supra, at 861. The Court also found that an aggravated battery could constitute torture to the victim as could serious sexual abuse. Clearly, these definitions of torture do not allow a Court to include any assault of lethal magnitude as asserted by the Petitioner.

In considering the specific facts of this case, Respondent asserts that this Court can clearly see that this does not present a simple case in which the victim did not die immediately. Had the fatal wound been the only one inflicted on the victim, then a finding of torture would be difficult to support. In the instant case however, there are numerous additional injuries that obviously occurred prior to death that do support a finding of torture. As noted by the Supreme Court of Georgia,

> "Under the evidence in this case, the victim was beaten with an iron pipe. She sustained multiple skull fractures and the force of the attack was so great that the skull was fractured almost in half. The victim sustained bruises on the left shoulder and neck probably as a result of being choked. The tongue and upper lip were bruised and part of the lower lip was swollen. After the victim sustained the head injuries, she was stabbed five times in the back and twice in the chest. Death ensued from the loss of blood.
>
> When the body was found, it was in a partial state of undress. One breast was exposed and the pants the victim was wearing were unzipped. Forensic evidence suggested the presence of seminal fluid in the oral cavity, but was not conclusive. However, the state of undress, bruising about the mouth, and the suggested presence of seminal fluid would authorize a finding of serious sexual abuse."

Cape, supra, 246 Ga. at 528. Thus, as noted by the Supreme Court of Georgia, there was sufficient evidence for the jury to find serious sexual abuse, thus constituting serious physical abuse or to merely make a finding of torture through the numerous and varied injuries inflicted to the victim prior to death. This is hardly a case to fall within the category of "ordinary murders".

Respondent asserts that, as found by the Supreme Court of Georgia, no limiting instruction was required to be given to the jury at trial. No such instruction was ever requested at trial, nor has this Court ever determined that such an instruction is an essential requirement. The statutory aggravating circumstance found by the jury was clearly supported by the evidence and the jury made a specific finding in the instant case of the seventh aggravating circumstance. The trial court instructed the jury as to the statutory provision and, thus, based on the common understanding of the terms in the statute, no further guidance was necessary.[2]

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2 Petitioner refers in his petition to this Court to certain recent cases considered by this Court. See Patrick v. Georgia, 49 U.S.L.W. 3371 (Nov. 18, 1980); Hardy v. Georgia, 49 U.S.L.W. 3371 (Nov. 18, 1980); Thomas v. Georgia, 49 U.S.L.W. 3371 (Nov. 18, 1980). Petitioner notes that the Supreme Court of Georgia relied upon Patrick and Thomas in its Appendix in support of Petitioner's death sentence and emphasizes the fact that this Court has recently remanded the cases. It should be noted that the cases in the Appendix in the decision by the Supreme Court of Georgia are considered to determine whether or not the sentence is successive or disproportionate to the penalty imposed in similar cases. The death sentences in the case cited by the Petitioner have not been vacated, but the judgment of the Supreme Court of Georgia has been vacated. Those cases, similar to cases decided by this Court in May, 1980, have been remanded for further consideration by the Supreme Court of Georgia in light of this Court's decision in Godfrey. This Court did not order that the sentences be vacated, but merely ordered that the Supreme Court of Georgia reconsider each case.

Respondent does submit that this allegation by the Petitioner does not present an issue for review by this Court.

B. THE TRIAL COURT PROPERLY CHARGED THE JURY DURING THE PUNISHMENT PHASE OF THE TRIAL AS TO MITIGATING CIRCUMSTANCES TO BE CONSIDERED BY THE JURY.

On direct appeal to the Supreme Court of Georgia, the Petitioner asserted that the trial court should have defined mitigating circumstances and specifically provided in written form the mitigating circumstances relied upon by the Petitioner. The Supreme Court of Georgia found that the jury was adequately instructed as to the meaning of mitigating circumstances and it was not required that specific mitigating circumstances be singled out.

Petitioner now asserts before this Court that the trial court's charge was devoid of any effective guidelines concerning mitigation and that the jury could not have been expected to know what they could and could not consider. Petitioner asserts that this factor combined with the fact that aggravating circustances were written down for the jury, produces an unbalanced effect and violates due process.

Under the statutory scheme set forth in Georgia, which has been upheld by this Court in Gregg, supra, statutory aggravating circumstances are required to be submitted to the jury in writing. This is required because the jury must find the existence of at least one of these statutory aggravating circumstances beyond a reasonable doubt before the death penalty can be imposed. Mitigating circumstances are not required by any of the statutes to be submitted to the jury

for their consideration. The trial court is only charged with instructing the jury that they are to consider anything in mitigation.

In the instant case, the Court charged the jury during the sentencing phase, "You should consider all the evidence submitted to you in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposes. This would include any evidence of mitigating circumstances received by you in this case." (T. 813). The Court went on to charge that the jury should consider any mitigating circumstances presented. The Court stated, "Mitigating circumstances are those circumstances which in fairness and mercy shall be considered by you in fixing the punishment. You may, if you see fit. . . provide for a life sentence for the accused based upon any mitigating circumstance or reason satisfactory to you, or without any reason, if you see fit to do so." (T. 813-814).

The Supreme Court of Georgia has considered this allegation on several occasions and found that mitigating circumstances are not required to be singled out under Georgia law, referring to Ga. Code Ann. § 26-3102. "Mitigating circumstances are not a predicate for a recommendation of a life sentence, though statutory aggravating circumstances are required for a death sentence." Thomas v. State, 240 Ga. 393, 401, 242 S.E.2d 1 (1977). In Spivey v. State, 241 Ga. 477, 479, 246 S.E.2d 288 (1978), the Supreme Court of Georgia held as follows:

> "The reason behind the ruling was that Georgia law no where defines mitigating circumstances. 'Mitigating circumstances' are referred to in Code Ann. § 26-2534.1(b) and § 26-2503, but the statutes are wholly silent on what they shall be. . . . The conclusion is inescapable that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating without limitation of definition. This is a constitutionally valid procedure."

In the instant case, the Court noted its previous decisions and found that there was no requirement that specific mitigating circumstances be singled out, nor was there any right to have written instructions sent to the jury concerning mitigating circumstances.

Respondent asserts that, contrary to Appellant's contention, this finding by the Supreme Court of Georgia does not present a violation of due process. The term mitigation is readily understood by the average person in the community. No further definition is required except to tell a juror that he may consider any evidence in mitigation. Clearly, any juror would realize that any factor that he considered mitigating would appropriately be considered by him in determining whether to impose a death penalty. Thus, there is no merit to this allegation by the Petitioner.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Garnett William Cape.

Respectfully submitted,

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